

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

To be Argued by WILLIAM SONENSHINE

76-1350

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1350

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

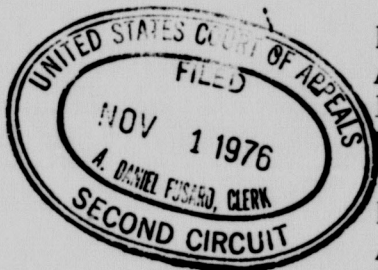
-against-

PHILIP RASTELLI, ANTHONY DE STEFANO and
CARL GARY PETROLE,

De fendant-Appellants.

On A ppeal from the United States District Court
for the Eastern District of New York

BRIEF IN BEHALF OF APPELLANTS
CARL GARY PETROLE and
ANTHONY DE STEFANO



EVSEROFF & SONENSHINE
Attorneys for Appellant DeStefano
186 Joralemon Street
Brooklyn, New York 11201

ERNEST J. PEACE,
Attorney for Appellant Petrole
114 Old Country Road
Mineola, New York 11501

WILLIAM SONENSHINE, ESQ.
Of Counsel

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT.....	1
POINT ONE	
The evidence under the various counts was insuffi- cient to establish guilt beyond a reasonable doubt or prima facie.....	4
POINT TWO	
The Court erred in permitting the prosecutor to question appellant DiStefano as to whether appellant knew why a government witness would give perjured testimony against him.....	31
POINT THREE	
The Prosecutor's summation was inflammatory and unfair.....	36
POINT FOUR	
Appellants Petrole and DeStefano adopt all argu- ments advanced by the co- appellant Rastelli, insofar as same are applicable to them.....	40
CONCLUSION.....	40

<u>TABLE OF CASES CITED</u>	PAGE
Berger v. U. S. , 295 U. S. 78, 55 S.Ct. 629.....	39
Burgos v. U. S. , 304, F. 2d 77 (2 Cir. 1962).....	39
U. S. v. Addonizio, 451, F. 2d 49, (Cir. 1972) cert. den. 92 S.Ct. 949, 405 U.S. 936.....	18
U. S. v. Biondo, 483, F. 2d 635 Cert. Den. 94 S.Ct. 1468, 415 U.S. 947.....	9
U.S. v. Kennedy, 219 F. 2d 457 (2 Cir. 1961).....	9
U.S. v. Lefkowitz, 284, F. 2d 310.....	39

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1350

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PHILIP RASTELLI, ANTHONY DE STEFANO and
CARL GARY PETROLE,

Defendant-Appellants.

BRIEF IN BEHALF OF APPELLANTS
CARL GARY PETROLE and
ANTHONY DE STEFANO

PRELIMINARY STATEMENT

Appellants Carl Gary Petrole and Anthony DeStefano appeal from judgments of conviction made and entered against appellant Petrole on June 18, 1976 and against appellant DeStefano on June 25, 1976 in the United States District Court for the Eastern District of New York, after trial before Hon. Thomas Platt, United States District Court Judge, and a jury.

Co-appellant, Philip Rastelli is represented on this appeal by John Lang, Esq.

Indictment no. 75 Cr. 160 filed March 5, 1975 charged appellants herein together with co-defendants, Workmen's Mobile Lunch Association Inc., and one Louis Rastelli in a 7 count indictment. Counts 3 and 6 were

dismissed during the trial, leaving counts 1, 2, 4, 5 and 7 for determination by the jury. Count 1 charged a violation of the Sherman Anti-trust Act, under U. S. Code, Title 15, Section 1. Count 2 charged a Conspiracy to violate the Hobbs Act. Counts 4, 5 and 7 charge substantive violations of the Hobbs Act.

At the conclusion of the trial the jury convicted the three appellants of each of the counts of the indictment, with the exception of count 4 as to which DeStefano was convicted and Petrole and Rastelli were acquitted.

Appellant Petrole was sentenced on June 18, 1976 under count one to a prison term of one year and a fine of \$1,000.00, under Title 18 U. S. Code, Section 4205 (b)(2). Under counts 2, 5 and 7 he was sentenced to a prison term of five years, under each count, to run concurrently with count one, under Title 18 U. S. Code, Section 4205 (b)(2), and he was further fined \$5,000.00 on each count, all prison sentences to run concurrently with count one.

Appellant DeStefano was sentenced on June 25, 1976 under count one to a prison term of one year and a fine of \$1,000.00 under Title 18 U. S. Code, Section 4205 (b)(2). Under counts 2, 4, 5 and 7 he was sentenced to a prison term of five years, under each count, to run concurrently with count one, under Title 18 U. S. Code, Section 4205 (b)(2), and he was further fined \$5,000.00 on each count, all prison sentences to run concurrently with count one.

Timely notices of appeal were served and filed.

The Evidence Upon the Trial

The pertinent facts as to the arguments raised upon this appeal are set forth under various point headings and, accordingly, are not reiterated herein.

POINT ONE

THE EVIDENCE UNDER THE
VARIOUS COUNTS WAS INSUFFI-
CIENT TO ESTABLISH GUILT
BEYOND A REASONABLE DOUBT
OR PRIMA FACIE

Count Four

This Count charges an appellant with a substantive violation of the Hobbs Act, in that in April, 1972 he attempted to prevent one David Levy from soliciting a mobile catering account. Appellant DeStefano, alone was convicted under this count. The other appellants were acquitted.

The basic evidence as to the event in question came from one Michael Tillman, a government witness who testified that in April, 1972 he was a taxicab dispatcher at the Long Island Transportation Company in Long Island City (873).*

It was customary for a mobile lunch truck to come to the premises and sell food to the cab drivers (874). The driver who came there in the morning and again at noon time was a fellow named Bobby. (874). A different driver with a different truck usually got there at about 4 P. M. (874).

One day in April, 1972 another lunch truck, operated by one David Levy, came to the yard on the premises and began to sell food items (875) to the cab drivers from the truck (876). Shortly thereafter the truck that usually sold lunches there, also arrived at the premises. The truck

* Numerical references in parenthesis refer to pages of the trial transcript.

was operated by the "steady" driver (877).

Levy then had a conversation with the other driver, following which the other (steady) driver went to a pay phone in the garage and made a phone call. Tillman did not overhear it. The driver then returned to his truck and remained there. He did not open his truck (880).

Shortly thereafter two men arrived and parked their car outside the yard and came into the yard. One of them was appellant DeStefano (881-882). The steady driver spoke to DeStefano (883).

DeStefano and the unidentified man who arrived with him then approached Levy's truck. The steady driver remained in the background (883). DeStefano then said to Levy that this was a steady stop for the regular man and no other food service vehicle can come in there. Levy replied that there was enough business for both trucks and why should he have to close his doors. DeStefano told him to pack up and leave if he knew what was good for him (884).

Tillman stated that at one point DeStefano made a motion to put his hand in his pocket, his jacket brushed back and Tillman noticed a revolver on his belt (885). At that point, Tillman told both truck operators (Levy and the steady driver) to leave the premises, which they did (885-886).

On cross-examination, Tillman stated that DeStefano asked Levy to sell the sandwiches right outside the lot rather than in the lot. Mr.

Levy replied, "why should I have to go out when I am in here?" (892)

Tillman also acknowledged that when he described the event to the Grand Jury he made no mention of a gun (899), nor was he asked about a gun in the Grand Jury (900). He also acknowledged that the report of the FBI agent who interviewed him contained no reference to a gun. Tillman maintained however, that he did tell the agent about the gun (905).

Appellant's testimony with respect to this event appears at pages 1071-1074: (A - A-1)

"BY MR. SONENSHINE:

Q. Did you ever appear at Eden Trucking?

A. Yes.

Q. Did something happen there?

A. Yes.

Q. Would you tell us what happened?

A. I went over there with Lou. One of the members had called the office and said there was a new van on his stop and if we were to go and talk to the guy, and we did.

Q. Now, when you got there, were there a great many cab drivers milling around these two trucks?

A. Yes.

THE COURT: Don't lead the witness, please.

Q. Would you tell us, please, what you said and did and what the man with the truck said and did and what anyone else said and did

"in connection with this transaction?

A. Well, Lou spoke to them mostly. 'Why you coming here? This man has been here so long.'

The man said 'I am here to make a living.'

Lou said, 'Everybody wants to make a living. Do you think it's right taking the money out of this man's pocket?'

Actually they got into a dispute with him.

Q. At that point, had you said anything?

A. No.

Q. What happened next?

A. Then he passed a remark.

Q. Who passed a remark and what was the remark?

A. Do I have to say it?

Q. Yes.

A. He said 'If I don't get out, what's the fat guy going to do, come break my legs?'

Q. Who said that?

A. The guy in the truck.

Q. Was that the short man or the taller man?

A. The short man.

Q. What happened next?

A. Well, I said, 'Hey, listen, did I say anything to you?' I was embarrassed. There were a lot of men around. It just got me.

Q. What did you say?

A. I told him I am not talking and this gentleman is, 'Why don't you talk to him like a gentleman like he is talking to you and don't call me fat. If you know what's good for you, don't call me fatso again.'

Q. When you had this conversation with him was that conversation with you being a member of the association or was this because he insulted you?

A. He insulted me. I don't know the man, he had no right to say that to me..

Q. Did you in any way threaten him?

A. 'Don't call -- if you know what's good for you, don't talk to me like that again.'

Q. In saying that, you weren't saying that in a connection with your work --

THE COURT: Sustained."

David Levy was not called as a witness. It was stipulated at the trial that he was in a hospital with a mental condition which bears no relation to the instant case (871).

Since the alleged victim of the extortion, David Levy did not give testimony, we are left with a fatal gap in the government's case - the

state of mind of Levy. (U.S. v. Kennedy, 291 F. 2d 457 [2 Cir. 1961]).

While there is evidence from Tillman that DiStefano told Levy to leave if he knew what was good for him, there is no evidence as to whether Levy was in any way induced to leave by virtue of DiStefano's remarks. When he finally left it was at the behest of Tillman who told him as well as DiStefano and the other to leave the premises.

With respect to the gun allegedly seen momentarily by Tillman, under DiStefano's jacket, there again is no proof that Levy saw it. Thus it cannot be urged that Levy was in any way affected by it. (U.S. v. Biondo, 483 F. 2d 635; cert den. 94 S. Ct. 1468, 415 U.S. 947).

Counts Five and Seven
(Hobbs Act, 18 U.S. C. §1951)

These counts center around similar fact patterns with the same legal principles involved. Accordingly they are considered simultaneously.

The facts pertinent to Count five are as follows according to the witnesses called by the government:

1. The Testimony of Paul Spector:

Mr. Spector, a member of the Association owned a commissary which supplied food items for his own five trucks and four other trucks which were owned by other association members (365-366). In the fall of 1970 he took in two partners with a view to expanding his commissary business (367-368). The two additional partners were the brothers Ralph and Gus Stingo (368). They formed the business known as One-Stop Catering (409).

The Stingos at the time were operating five trucks of their own and were purchasing food supplies from a commissary called Canteen Associates (368).

In line with their expansion plans, Spector and the Stingos approached one of the owners of Canteen Associates, one Al Conversi, and offered to buy out Canteen Associates (369). During the negotiations, Conversi quoted them a price of \$30,000.00 payable part cash and part in promissory notes. The price to include the commissary, its equipment and good will (399). They asked Conversi what interest Petrole had in the business. Conversi replied that he paid 10% to Petrole on business sent him from the Association (400).

Thereafter, Spector and the Stingos met with Gary and told him they wanted to buy out Canteen (401). Petrole told them Canteen was having financial trouble and their checks were "bouncing". Spector offered to pay Petrole a commission of 3% rather than 10% on Association trucks they would service. Additionally they offered to include their own 14 trucks on which they would pay Petrole 3% commission (401-403).

Petrole stated that he got 7% and Louis Rastelli, the association president (a severed co defendant) got 3%, (402) and he (Petrole) would take it over with the old man and let them know (404).

A few days later they met again, Petrole told them that the fact that they were giving him their 14 trucks as customers made it feasible for

him to accept a lesser amount of 7%. They told Petrole that they would make the deliveries of food items to the truck owners rather than Petrole having to do it (404-405), which would justify their offer of 3% (406). Petrole replied that it couldn't be done, and the meeting ended (406). Spector and the Stingos would not agree to Petrole's figure and no further meetings were held (406).

They never bought out Canteen Associates (408). They decided as businessmen, it was "not a good deal" (427). Petrole did not in any way force him or threaten him to take the deal (442-443).

2. The testimony of Ralph Stingo

Ralph Stingo's testimony (465-474) as to the negotiations were substantially similar to that of Spector except that he stated Louis Rastelli was also present at the last two meetings and DeStefano was not present at the last meeting at which the breakdown of the 10% figure was discussed (474).

3. The Testimony of Gus Stingo

Gus Stingo's testimony as to the negotiations were substantially similar to that of Ralph Stingo (482-504).

4. The Testimony of George Avadkian

George Avadikian, along with his brother-in-law Al Conversi were the owners of Canteen Associates. Petrole never approached them to do business regarding the Association. Avadikian and Conversi sought out Petrole and they agreed to pay Petrole for business he brought them (528).

5. Testimon of Alfred Conversi

Conversi sought to expand the business of Canteen Associates.

Toward that end he contacted Petrole and asked Petrole if he could persuade some of the members of the Association to buy from him. Petrole said he would inquire of them if they were interested (532) Petrole further told him he could not assure him that any members would buy his products.

Petrole asked if he would give him a percentage, to which Conversi replied he would gladly give Petrole 10% with the understanding that if it turned out to be too much, Petrole would accept less (535;A-5).

Initially, two or three Association drivers started to buy from him, but ultimately he had as many as twenty. But they only bought certain items. They also bought from other commissarys if the other commissary's prices were cheaper (535-536).

Conversi testified that when he was negotiating to sell his business to Spector and the Stingos, he told them he was paying Petrole 10% (540;A-6).

In response to a question by the prosecutor as to whether if he didn't pay Petrole the drivers would go elsewhere, Conversi replied, "No, he couldn't make the drivers do anything. I understood they could do as they please." (540-541;A-6 - A-7).

Conversi further stated that he had paid Petrole only as to customers Petrole brought to him, but not as to customers Conversi acquired on his own (542).

At one stage, when Conversi felt he couldn't pay the 10%, Petrole agreed to take less (543).

This concluded the government's proof as to Count five.

We turn now to the government's proof as to Count seven.

The Testimony of William Bruce

Mr. Bruce testified that in early 1971, he was President of Bruce Vending company mainly selling food products through vending machines. At that time he decided to develop additional business by selling sandwiches to mobile lunch trucks (657-658).

Accordingly he went to the place where the mobile lunch trucks loaded up, which was a block from his place of business (658). He spoke to some drivers there who were Association members and was told that Petrole was in charge of purchasing sandwiches for the trucks (663). Bruce told them he was very interested and would like to talk to Petrole. He asked them to have Petrole contact him. (664).

Approximately a week or two later Petrole came to Bruce's office with Mr. DiStefano (664-665). During the ensuing conversation, Petrole said he was in charge of supplying sandwiches to the mobile trucks. DiStefano said that they would have to test out the products and would need approval of the Association (665). Petrole said their present supplier (Quick-Snak) was not satisfactory. An appointment was made for a further discussion and to inspect the sandwiches and price list (667).

On their next meeting, Petrole and DiStefano tried Bruce's sandwiches

and advised that they were good and should be tried out by one or two of the trucks for a week's trial. They also told him he would have to pay a 12% commission on the total volume of sandwiches. Bruce replied that the figure was too high (668).

However, Mr. Bruce agreed to pay the 12% on the theory that he anticipated \$ 8,000 or \$ 9,000 worth of business based on what they told him and his overhead would not increase substantially and "it would be a profitable venture for the company". He felt he could not get the business without paying the requested commission (671).

After that, Bruce began to pay the 12% commission to Petrole by check (672). After a few months, he met with Petrole, Di Stefano and Louis Rastelli (674). They told him most of the drivers were satisfied with his product and one of their other supplier's had a fire and was going out of business. Accordingly, they were going to sent those customers him (674-675). That new business amounted to \$1,200. to \$1,500. gross sales per week (676).

Bruce kept complaining, however, that the gross volume did not reach the anticipated \$9,000 per week, and that the gross did not exceed about \$5,000 per week (678).

After several months, Bruce met again with Louis Rastelli, Petrole

and DiStefano and asked that the commission be reduced or he would have to raise the prices. DiStefano got up and said there would be no change. Petrole and Louis Rastelli thereupon asked DiStefano to leave, which DiStefano did (680-681).

Petrole and Louis Rastelli told Bruce they have to spread the commission around. Some would have to go to Louis and some to Tony and the matter had to be discussed further; they would get back to Bruce in a few days (681-682).

The following week, Bruce met with Petrole again and Louis Rastelli (683-684), who told him they would agree to reduce the commission to 10%. Bruce said this was not low enough because his sandwiches were priced too low, his labor and other costs were increasing and he would have to increase his sandwich prices. They told him if he did that he would lose the customers (684).

Bruce said he would try to increase his prices for sandwiches and would put out a new price list (685). He did so on a Wednesday. On Friday, there was a commotion in the back of his premises. A large number of drivers were there as were Petrole, DiStefano and Louis Rastelli (686). The drivers were screaming at Tony and Gary that they had brought the drivers there and the prices now increased and they (the drivers) would not do business there but would go someplace else.

Tony and Gary were trying to explain to the drivers that Bruce's

costs had gone up and he makes a good sandwich and the increase was only a matter of a few pennies (687).

Bruce, Petrole, DeStefano and Louis Rastelli went into Bruce's office and discussed the matter. They told Bruce, "See, we told you so, you are going to lose all the business if you don't rescind the price increase". Bruce thereupon rescinded the price increase and continued to service the association drivers as before (688). Petrole told him he (Petrole) could not control the drivers (732).

Bruce also stated that Petrole and Louis Rastelli had told him on other occasions that some of the commissions also went to Phillip Rastelli and some went to DeStefano and some went to the association as well as to themselves (689).

Ultimately, in about December of 1971, Bruce stopped serving the association drivers because he was losing money (690-691). During the preceding summer Bruce was behind on his commission payments and Petrole, DeStefano and Louis Rastelli told him the customers would be taken away from him and given to Quik-Snak (694).

The foregoing summarized the proof adduced by the government under Count 7. Motions to dismiss Counts 5 and 7 for insufficient evidence were denied (1034: 1681).

It was the theory of the prosecution that appellants violated the Hobbs Act through extortion by threats of economic harm.

With respect to Count 5, it was the Government's view that Spector and the Stingos' were deprived of the right to purchase Canteen Associates because by so doing they would be required to continue payment of a commission to Petrole in order to keep the customers he had selected for Canteen Associates.

The fact remains, however, by the Government's own proof that Conversi had sought out Petrole and offered him a commission if he would persuade the drivers to buy from him. This Petrole did. Conversi so advised Spector and the Stingos'. Indeed, the latter were also desirous of keeping the customers produced by Petrole if they bought out Canteen Associates- but at a lower commission rate. This Petrole did not want to do-nor was he bound to do so.

Spector and the Stingos' had no economic right to compel Petrole to yield the fruits of his labors in order to enable them to purchase Canteen Associates on terms they sought to impose.

Spector and the Stingos' were businessmen who approached Conversi to buy his business. Conversi told them that among the obligations of the business was a valid agreement to pay a commission to Petrole for customers he brought in. To hold that they now acquired an economic right to compel Petrole to surrender or modify that agreement would be tantamount to holding that Petrole's

intransigent refusal to yield his commissions was equivalent to an extortion.

The Government relied on the case of U.S. v. Addonizio, 451, F 2d 49 (Cir. 1972), cert.den. 92 S. Ct 949, 405 U.S. 936.

That case, however, preceeded along different lines. There the City of Newark had by law established a procedure for bidding on city contracts wherein the lowest bidder was entitled by law to be awarded the contract at stake. The public officials who controlled these matters destroyed this right by attaching an illegal condition as a prerequisite - namely the payment of 10% of the price to them in order to secure the contract which by law became their's without the 10% kickback. Failure to pay the 10% resulted in depriving them of the right to the contract - an economic right which was theirs by law.

At bar the situation is entirely different. Nothing in the record gave Spector and Stingos the right to purchase Canteen Associates upon terms set by law. This was a private business transaction. Conversi voluntarily entered into an agreement with Petrole for commissions on customers which Petrole produced. That became an internal obligation of the business so long as Petrole produced the customer and Conversi accepted them.

In Addonizio, contractors had legal economic rights created by Newark law before they made their bid - namely the right to have their bid prevail if it was the lowest. Spector and Stingo had no such right when they approached Conversi and offered to buy Canteen Associates from him. When they chose not to meet his terms, because they found Canteen's continuing business obligation to Petrole not to their liking, they were not thereby deprived of anything which the law entitled them to have in the first instance.

We turn now to Count 7. In this case Bruce actually agreed to pay Petrole a commission, after seeking him out and asking him to get the customers for him. Bruce solicited Petrole for purely business reasons and agreed to pay a commission (albeit greater than he anticipated) for the simple and classically sound business reason that he expected it would be "profitable".

The Government's theory of extortion here seems to turn on the fact that Bruce was originally told by some unidentified truck drivers that Petrole was in charge of sandwich purchasing. From this tenuous evidence the Government argues that appellants had such a degree of control over the drivers that they could thereby control them and prevent commissary operators from soliciting their business except by kick backs to appellants. This, the Government urges is sufficient to prove an extortion under the Hobbs act as per Addonizio, supra.

The Government's own evidence, however, dispels any such claim. Petrole told Bruce at the outset that before he could induce the drivers to buy from Bruce, he would have to have the approval of the association and test out the quality of the sandwiches for a week - hardly evidence of illicit control by Petrole.

The proof of the pudding however comes - again from the Government's witness Bruce - when Bruce wanted to increase his prices for sandwiches sold to the drivers.

Appellants told Bruce the drivers would not pay the increase and Bruce would lose them as customers. Going against their advice, he increased his prices. The drivers - despite appellants' attempts to placate them by explaining the reasonableness of the small increase - refused to purchase any more sandwiches from Bruce at the increased prices.

As a result Bruce yielded and returned to the former price list. Only then did the drivers resume purchasing from him. It thus becomes evident from the Government's proof that appellants exercised no control over the drivers. To the contrary, the drivers were motivated and controlled only by their profit motive. Appellants' capability to deprive Bruce of an economic right (if any there was) was in fact nil.

The Government failed to prove an extortion under Counts 5 and 7.

Count Two

This count relates to an alleged conspiracy to commit extortion

in violation of the Hobbs Act. It encompasses among its purposes the substantive acts comprising Counts 4, 5 & 7 (discussed, supra) as well as the testimony of Paul Gellman, Kathleen Cardineau, Edward Sedara, Robert Frank and Frank Morgan.

We incorporate herein by reference the testimony dealing with the substantive counts 4, 5 & 7 already discussed and we proceed directly to the testimony of the above named individuals.

(a) PAUL GELLMAN

Gellman testified that in 1968 he was in the business of selling cakes and pastries. Among his customers were about 12 members of the Association (595). He served these customers into 1969. At that time he was approached by Louis Rastelli (596) who told him that he (Rastelli) had taken the Workmens' Mobile Association and was looking for a better deal on cake and if Gellman wanted to continue servicing him Gellman would have to give a better price on the cake. Rastelli further told him that he wanted .03 cents per box of cake and if he couldn't do it a company called Quik-Snak could (597). Rastelli also stated that his uncle wanted part of the action (597-8). Gellman agreed to pay .03 cents per box of cake (602) which came to about \$30.00 per week (603). Gellman sometimes gave the money to DeStefano (603-4), and once or twice he gave it to Petrole (610).

After about nine months (604) he told Louis Rastelli he couldn't

pay the \$30.00 per week anymore. Rastelli replied that he would try to find someone else to service him with cake. After that all but four of the drivers stopped buying (607-625). This lasted about six or seven months at which time Pastelli approached him and said the drivers were not satisfied with Spector's merchandise and he wanted Gellman to resume selling cake to the men. Gellman agreed to pay .03 cents a box as before and the drivers returned to him (608). Gellman paid the \$30.00 in order to keep the business (612) which was profitable (639).

Gellman further stated when Rastelli asked him to resume selling to the association drivers, Spector was paying 5 per cent, but Rastelli agreed to accept 3 per cent from Gellman because Gellman sold a better cake (625-626).

When Gellman gave the money to DeStefano it was because DeStefano was there anyway collecting the association dues and Gellman gave the cake money to DeStefano as a convenience for DeStefano to bring it back to Rastelli. DeStefano was also a customer of Gellman's at the time (633-634).

(b) KATHLEEN CARDINEAU

Miss Cardineau took over a commissary owned by Frank Sedara and Bob Frank in 1969 or 1970 (742-743). She had a partner named Joan Warwick. They serviced about 4 or 5 trucks at that time (743), to which she provided meat and salad sandwiches (744).

In 1972 she was approached by Petrole (744) who came into her store and spoke to her then partner Pat Ingui (745-746). Petrole told her he could get more drivers for her if she would give him 10% of the gross. She did not agree to the 10% but arrived at an agreement to pay him \$80.00 a week for which Petrole brought her about 10 new customers (750).

She continued this arrangement until approximately the end of 1972 (710). The eighty dollars per week came to less than the 10% amount originally discussed (760). She stated also that whether the money be termed a commission or a kickback or otherwise she would have paid the \$80.00 per week in order to get the business (764).

(c) EDWARD SEDARA

In 1965 Sedara and his two partners operated a mobile lunch truck (64). There was an expression in the trade known as "bumping" which meant that when one truck frequented a location or "stop" another would appear there to compete with the truck that previously was alone there (70). Ultimately, one would succeed in getting the most business and the other would leave the spot (70-71).

In late 1965, Petrole and one Joey Occhiogrosso approached him to join the Workmen's Mobile Lunch Truck Association. At that time Petrole told Sedara that if he was coming into the area with a new

truck he was looking for trouble (71). Petrole further told him that an association was being formed and that among the benefits of membership would be route protection, better prices on milk purchases, group insurance and hospitalization (74). He and his partners joined the association. The initiation fee was \$50.00 and a weekly fee of \$3.00, which at a later time was increased to \$6.00. The money was collected by Petrole (76). The association was chartered January 18, 1966 (81).

At the time of joining the association, Sedara had been "bumping" Paul Spector who was selling at a location called Williamsburg Steel. He was approached by Petrole (76-77) who told him that Spector wanted to join the association on condition that Sedara stop bumping him at Williamsburg Steel. Petrole further told him it would be good to have Spector join because Spector had six trucks to bring into the association and Spector was willing to give Sedara other stops in exchange for getting off the Williamsburg Steel stop (80). Sedara said he couldn't trust Spector to give him stops equal in value to Williamsburg Steel.

At that time Petrole told him they would take the matter to the "boss" (83). A day later Petrole told Sedara to meet him at his store in Greenpoint and the boss would be there to solve the problem.

Sedara went there with his partner, Bob Frank (84). Bob

Frank was armed (85). Inside Petrole's store, they were introduced by Petrole to Phillip Rastelli as the boss, whom Petrole called "Rusty" (86-87).

Rastelli told them he thought Spector's offer was a pretty good deal. Sedara said he didn't trust Spector to give him stops that would produce income to equal what they were earning at Williamsburg Steel. Rastelli told him if the exchange stops didn't do the business Spector claimed they would, Spector would have to answer to him (88-89). Sedara and Frank said they would think it over and they left (90).

The following morning Sedara met Petrole at the dairy. Sedara told Petrole he and his partners decided not to give up the Williamsburg Steel stop (94). Later that day Joey Occhiogrosso tore the membership sticker off his truck and told him he was out of the association and not to blame the association if anything happened to him (94-95).

About a week later he learned from his partner, Frank Morgan, that Morgan and Petrole had gotten into a fist fight at one of their stops. About a week after that about 10 or 15 men damaged his truck by breaking the window and making a hole in the door (121-122).

Sedara thereafter approached Petrole and offered to make

a truce. He (Sedara) was afraid (123). Sedara said he and his partners were willing to accept the stops offered by Spector and to leave the Williamsburgh Steel stop. Petrole said he would arrange a meeting (125).

A few days later a meeting was held at the Trotters Restuarant in Queens attended by Petrole, Occhiogrosso, Spector, Bob Frank and Sedara (125-126). At this time Sedara said they reached an agreement that each would leave the other alone at their respective stops, and they shook hands (127). They rejoined the association, attended meetings and went to the association's sponsored dance (127-128).

Sedara remained in the association until the spring of 1968 when the partnership broke up. He and Bob Frank went up to Yonkers. Frank Morgan remained in Queens (129-131).

(d) FRANK MORGAN

Mr. Morgan's testimony was substantially similar to that of Edward Sedara, supra.

(e) ROBERT FRANK

Mr. Frank's testimony was substantially similar to that of Edward Sedara, supra.

The foregoing constitutes the pertinent testimony adduced by the prosecution relating to the Hobbs Act conspiracy charged under Count 2 of the indictment.

The testimony of Paul Gellman was offered by the Government to demonstrate that Gellman was deprived of an economic right. Yet, analysis of his testimony establishes only that the transaction in which he engaged was a common commercial transaction.

No threats, express or implied were made. He was presented with an opportunity to increase his business by paying a commission in return. He was not prevented in any way from soliciting the Association members on his own. To the contrary, Gellman testified that even after he told Louis Rastelli he could not afford to pay the commission any more, some of the drivers still continued to buy from him.

While he also lost other drivers as customers, no evidence was adduced to establish that the drivers were in any way coerced into not buying from him. The Government's proof in this regard reaches no further than to establish inferentially that Louis Rastelli might have been a causative factor in that result. The difficulty remains that there is no evidence in the record that his conduct in that regard

was illicit*.

With respect to Kathleen Cardineau, her situation is even clearer. Here, Petrole offered to bring customers to her for a commission. She readily accepted and negotiated the commission downwards to terms more favorable to herself. There is not the slightest hint of any coercion by threats or otherwise exerted against either her or the customers which Petrole brought to her and from whom she profited.

The arguments heretofore advanced with respect to counts 5 and 7, supra, are equally applicable to Gillman and to Cardineau.

The Sedara-Morgan-Frank incidents present a different situation. The events recounted in their testimony occurred in 1966 - 1967 some 8 or 9 years prior to the return of the indictment in 1975 and were beyond the statute of limitations. The Government obviously recognized this and therefore did not allege those events as a separate substantive count in the

*While there was some confusion over whether Gillman's payments on cake sales to association members took place in 1971 or 1972 (1106;A-8)(1112;A-9), DeStefano testified on cross-examination that he deposited the monies collected from Gillman into the Association's treasury (1101;A-10). When shown the Association's cash receipt book for 1971 (Exhibit 36), he could not locate any entry reflecting those payments (1106-1107;A-8-11). However, when shown the Association's cash receipt book for 1972 (Exhibit 34), DiStefano pointed out some of the book entries reflecting receipt by the association of Gillman's cake payments (1108-1109;A-12-14).

indictment. Thus, if we are correct in our contention, that the events testified to by the other witnesses do not amount to criminal conduct by appellants, then the convictions under counts 2, 4, 5 and 7 should be reversed and dismissed.

POINT TWO

THE COURT ERRED IN PERMITTING
THE PROSECUTOR TO QUESTION
APPELLANT DESTEFANO AS TO
WHETHER APPELLANT KNEW WHY
A GOVERNMENT WITNESS WOULD
GIVE PREJURED TESTIMONY
AGAINST HIM.

Among the witnesses called by the government was William Bruce who testified as to alleged threats of economic harm to him if he did not comply with certain demands by appellants as to food prices to be charged to members of appellants' association.

More specifically, Bruce had indicated that he intended to increase his prices for sandwiches he had been selling to members of the association. Appellants had a meeting attended by Bruce, appellants Petrole and DeStefano and others. Bruce testified that there was a heated discussion on this matter of prices to be charged by him to association members, (See Point One, supra, pages 10-17).

Appellant DeStefano, testifying as a witness in his own behalf, was cross-examined on this point by the prosecutor (1096-1098; A-19- A-21):

" Q. Mr. DeStefano, didn't you
testify on direct that when Mr. Bruce

suggested raising prices that you, as an officer of the association could not stand by and let the membership be abused in that way and therefore you told him he couldn't do it and shouldn't do it?

A. I didn't tell him directly. I spoke in general to Bill, Louis and Gary.

Q. You were so incensed --

A. No, it wasn't the way he says, no. I didn't get up in a huff and get out.

Q. Didn't you get into an argument with Bruce?

A. No. I said, I don't think you should raise it. You're not giving the men a better sandwich.

Q. You said that Bruce shouldn't raise it because he's not giving a better sandwich?

A. Right.

Q. No argument?

A. No argument.

Q. Were you asked to leave after that comment?

A. Yeah.

Q. And there was no heated discussion before you were asked to leave?

A. No heated discussion.

Q. Did you hear Mr. Bruce testifying?

A. Yes.

Q. Did you hear him say it was a heated discussion?

A. Yes.

Q. Was he telling the truth?

A. No, he wasn't.

Q. Do you know any reason why he would like (sic) on the witness stand?

MR. SONENSHINE: Objection. He is asking him to testify to the state of mind of another witness.

THE COURT: I will allow it.

Q. Do you know why Mr. Bruce would come in here and perjure himself?

A. I don't think the man ever took a liking to me because I was just too much for my men. "

Additionally, in regard to another phase of the case, a government witness named Tillman (count 4) had testified that appellant DiStefano had, in his presence, threatened a man named Levy during a dispute as to whether Levy (a non-member) could compete with a member at a certain location known as Eden Transportation Co, (See Point One, supra).

On cross-examination of Di Stefano by the prosecutor, the following appears in the record (H25: A- 22).

" Q. When you went out to see about the bumping at Eden Transportation, did you have a gun with you, sir?

A. No.

Q. Did you have a gun in your belt, sir?

A. No.

Q. Did you hear Mr. Tillman testify to that?

A. Yes.

Q. Had you ever met Mr. Tillman before today to your knowledge?

A. No.

Q. Does he have any reason to lie?

A. I don't think so.

MR. SONENSHINE: I object to it.

THE COURT: If he knows a reason.

A. No, I don't know if he has a reason to lie.

Appellant DiStefano's entire defense at the trial was his own credibility as opposed to the government witnesses' version of what occurred during the protracted period of time in which these events occurred. Thus, if the jury did not believe his version he would be (and was) convicted.

Against this background, the prosecutor was twice allowed to demand of DiStefano that he supply a motive for the government witnesses to give false testimony-- with the resultant prejudicial impact that DiStefano's failure to account for the false testimony unfairly appeared to have

stampal the government's witnesses with the imprimatur of truth.
In such manner the burden of proof in effect now shifted improperly
from the government to appellants.

It is respectfully urged that it was prejudicial for the court below
to permit such questioning by the prosecution.

POINT THREE

THE PROSECUTOR'S SUMMATION
WAS INFLAMMATORY AND UNFAIR

Two prosecutors rendered summation for the government -- Mr. Weintraub originally and Mr. Bernstein in rebuttal.

In the initial summation, Mr. Weintraub referred to two government witnesses -- Ralph Stingo and his brother Gus Stingo-- each of whom had testified as to commissions which Petrole has received from a commissary owner (one Conversi) whose business they were interested in buying. The commissions were based on sales to customers produced by Petrole.

It was the government's contention (Count 5) that Petrole's control over receiving these commissions prevented them (Stingo) from negotiating a better purchase price from the then owner since Petrole would not reduce his commission in the event the Stingos' bought out the business from Conversi.

Mr. Weintraub told the jury (1707-8: A- 16 A-17):

"MR. WEINTRAUB: What other commissaries were involved? Well, we have some testimony from Mr. Spector, and not Mr. Spector by himself but with Ralph and Gus Stingo. Ladies and gentlemen, I submit that Ralph and Gus Stingo were not happy to be called as witnesses in this case. They were not anxious to get up there and give their testimony.

MR. SONENSHINE: Objection.

THE COURT: Overruled.

MR. WEINTRAUB: Their testimony had to be extracted as if they were sitting in a dentist's chair having teeth pulled. But ladies and gentlemen, with that testimony--

THE COURT: Overruled. Don't interrupt.

MR. SONENSHINE: All right, I'll wait.

Mr. Burnstein, in his rebuttal summation, picked up the cudgels as to Stingo's testimony at page 1831 (A -15):

" You saw their demeanor on the stand, ladies and gentlemen. You saw their demeanor. It was like pulling teeth out of them. Grudgingly they admitted the truth of what they said in the Grand Jury".

The obvious inference which both prosecutors in tandem sought to have the jury draw was that the witnesses' reluctance was the product

of fear and reprisal by appellants. Yet there is nothing in the testimony of the Stingos to justify such an inference, or such a comment by the prosecutors.

Any doubt as to the purpose of the prosecutors' remarks on this point are dissolved when one considers with it the prosecutor's further remarks a few minutes later (1844; A-18):

" And then of course there is the argument that no threats were ever made, nobody forced these drivers to move. Well, ladies and gentlemen, I say it again, if you have the power of Philip Rastelli behind you, you didn't have to beat somebody over the head, your presence and your smooth talk and the velvet word was enough. The velvet word that has come out from witnesses here as respect, cooperation, agreement .

Because behind that velvet word there was a velvet hammer".

Rastelli, it should be noted, did not testify or produce any witnesses. Yet, the reference to his "power" was a thinly disguised, improper innuendo that he had not only the capability of violent enforcement of his demands but a concomitant ability to inspire fear of violence from him in those who might come forth to speak against him.

Appropriate objections were overruled (1708; 1855;-1856; 1863-1864).

As noted in Bugros v. U.S., 304 F2 177 (2 Cir. 1962) by Chief Judge Lombard at p. 178.

" It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case".

See also, Berger v. U.S., 295 U.S. -78, 55 S. Ct. 629.

Additionally, we respectfully call the Court's attention to the following unfair comment by the prosecutor in which he implied that Petrole had failed to report in his tax returns the true extent of his commission from a company called Quik-Snak. Nothing in the record justified this attempt to impute criminal misconduct to Petrole in connection with reporting his income for tax purposes.

The prosecutor told the jury at p.1707 (A).

" Ladies and gentlemen, I suggest to you that there is evidence in this record that the \$300 a week salary that is reflected on Mr. Petrole's tax returns is not all the money that Quik-Snak paid, but there were additional cash payments which didn't show up there.

MR. PEACE: Objection.

THE COURT: The jury can make an inference.
Overruled.

Such improper comment falls within the principle set forth by this court in U.S. v. Lefkowitz, 284 F2, 310;

***The peculiar vice of the argument lay in the implication, perhaps unintended, that the government knew a good deal about Lefkowitz dehors this instant case 'that Mr. Heller doesn't know and that was not in evidence'.

The combined effect of the unfair comments by the prosecutors prevented appellants from receiving a fair trial.

POINT FOUR

APPELLANTS PETROLE AND
DE STEFANO ADOPT ALL ARGU-
MENTS ADVANCED BY THE CO-
APPELLANT RASTELLI, INsofar
AS SAME ARE APPLICABLE TO THEM

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED AND THE INDICTMENT
DISMISSED OR, IN THE ALTERNATIVE, A
NEW TRIAL SHOULD BE ORDERED

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Appellant DeStefano

and

ERNEST J. PEACE
Attorney for Appellant Petrole

Dated: Brooklyn, New York
October, 1976

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)ss:
COUNTY OF KINGS)

Marie Miller, being duly sworn deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York.

That upon the 1st day of November, 1976 deponent served three copies of the within BRIEF on behalf of Rastelli, et al., upon Hon. David G. Trager, United States Attorney, Eastern District of New York in this action at 225 Cadman Plaza East, Brooklyn, New York, the address designated for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
1st day of November, 1976

ELIZABETH ANNE HARRIS
Notary Public, State of New York
No. 24-0064050
Qualified in Kings County
Commission Expires March 20, 1977

Elizabeth Anne Harris

Marie Miller